

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
APPENDIX**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1015

B
PTS

UNITED STATES OF AMERICA,

APPELLEE,

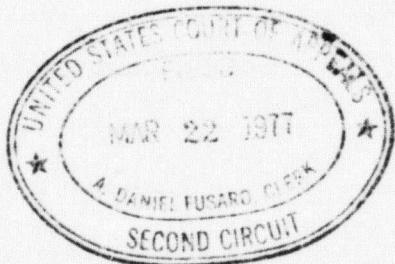
-vs-

JAMES APUZZO,

APPELLANT.

On Appeal from the United States District Court
for the District of Connecticut

APPENDIX TO BRIEF OF APPELLANT, JAMES APUZZO



Andrew B. Bowman
Federal Public Defender
770 Chapel Street
New Haven, Connecticut 06510
Attorney for Appellant
(FTS) 8-643-8148

PAGINATION AS IN ORIGINAL COPY

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Argument and ruling of trial judge concerning admissibility of prior convictions	44
Testimony of informant Robin Bourgeois concerning his opinion that appellant was engaged in other crimes, objection and motion for mistrial, ruling and cautionary instruction of trial judge	56

FILED

FEB 7 1976

U.S. DISTRICT COURT
NEW HAVEN, CONN.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :

v.

: CRIMINAL NO. N-76-54

JAMES APUZZO :

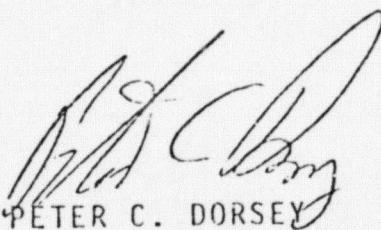
INDICTMENT

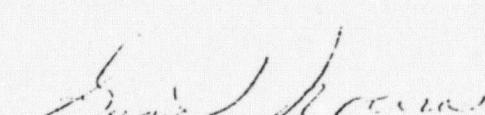
The Grand Jury charges:

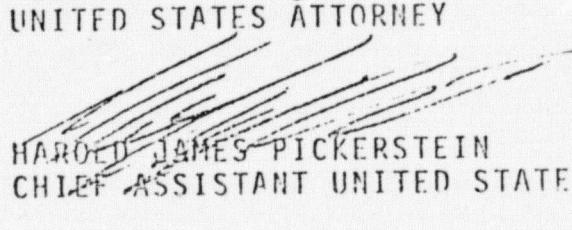
That beginning on or about the 26th day of February, 1976, to on or about April 6, 1976, in the District of Connecticut, JAMES APUZZO, knowingly did engage in the business of dealing in firearms without being licensed to do so under the provisions of Chapter 44, Title 18, United States Code.

In violation of 18 U.S.C. Sections 922(a)(1) and 924(a).

A TRUE BILL


PETER C. DORSEY
UNITED STATES ATTORNEY


FOREMAN


HAROLD JAMES PICKERSTEIN
CHIEF ASSISTANT UNITED STATES ATTORNEY

CIVIL OR CRIMINAL Case No. 3 District Court

PETTY OFFENSE PO [] JUDGE MAGISTRATE Assigned U.S.
 MINOR OFFENSE MO [] Q7 vs
 MISDEMEANOR Mis [] 205 Disp/Sentence
 FELONY Fel [X] 03 Office

APUZZO, JAMES

Case Filed
Mo. Day
4/7
No. of Defs
1
JUVENILE

RCZ

76 N-76-54

U.S. TITLE/SECTION

18:922(a)(1) Dealing in firearms w/o license
924(a)

OFFENSES CHARGED

ORIGINAL COUNTS

SUPERSEDED COUNTS

U.S. MAG. CASE NO. ▶ 76-251

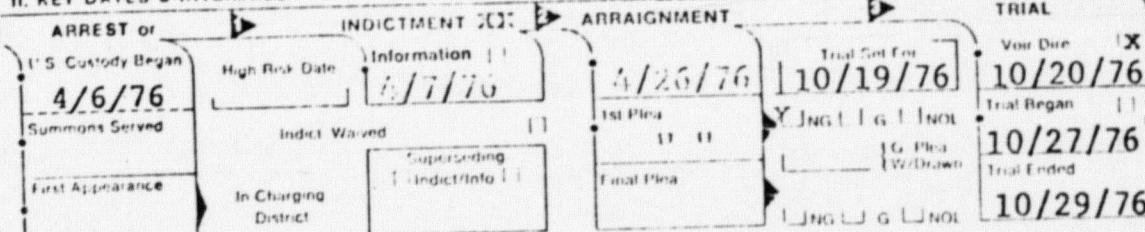
BAIL • RELEASE

AMT Fugitive
 Bond Pers Recd
 Set PSA
 \$ 5,000 conditions
 Date 10% Depo.
4/6/76 Surely Bon.
 Bail Not Made Collateral
 Status Changed 3rd Ptry Cust Off
 (See Docket) Off

SENTENCE

Disposition of Charges **10/29/76** **12/14**
 Convicted On All Chgs
 Acquitted On Lesser Offenses
 Dismissed WOP
 On Government's Motion

II. KEY DATES & INTERVALS



		DATE	INITIAL/NO.	MAGISTRATE	INITIAL/NO.	OUTCOME
Search Warrant	Issued Return			INITIAL APPEARANCE DATE ▶ 4/6/76		<input type="checkbox"/> DISMISSED
Summons	Issued Served			PRELIMINARY EXAMINATION OR REMOVAL HEARING	Date Scheduled ▶ 4/26/76 Date Held ▶	<input type="checkbox"/> HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
Arrest Warrant Issued				<input type="checkbox"/> WAIVED <input type="checkbox"/> NOT WAIVED <input type="checkbox"/> INTERVENING INDICTMENT	Tape Number	<input type="checkbox"/> HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW
COMPLAINT ▶	4/6/76					
OFFENSE (in Complaint)	Firearms violation					

U.S. Attorney or Asst.

Peter C. Dorsey
Harold J. Pickerman
XXXXXXXXXXXXXXXXXXXX
Hugh W. Cuthbertson

ATTORNEYS Defense: G.J. Ref: □ Waived: □ Self: □ None / Other: PD CO

Andrew B. Bowman
xxxxxxxxxxxxxxxxxxxx,
770 Chapel St.
New Haven, Conn.

* Show last names and suffix numbers of other defendants on same indictment/information

DATE	DOCUMENT NO.	PROCEEDINGS	EXCLUDABLE DELAY
4/7/76		Indictment returned and filed at New Haven. Summons may issue for April 26, 1976 at 10:00 a.m. in New Haven. Norman, J. m-6/6/76.	(a) (b) (c)
4/8/76		Summons issued and handed to U.S. Marshal for service.	
4/14		Marshal's return showing service, 11:45 a.m.	
4/19/76		Receipt of Summons acknowledged by G.A. and filed.	
4/26/76		PLEA: Plea of not guilty entered to Cr. 1. Case continued on same bond. Zampano, J. m-6/6/76.	
4/29/76		Court Reporter's Notes of Proceedings (Plea) held on 4/26/76, filed. Russell, R.	
6/28/76		Notice of Readiness, filed by govt.	
8/2/76		Court Reporter's Sound Recording of Proceedings (Plea) held on Apr. 26, 1976, filed. Russell, R.	

DATE
1976

(DOCUMENT NO.)

9/14/76

On RCZ's Jury Assignment List: Ready #6.
Zampano, J. m-9/15/76.

9/20

Motion for Disclosure of Address of Informant, or
for the Dismissal of the Indictment or for
Continuance and Memorandum in Support of Deft's
Motion for Disclosure of Address of Informant or
for Dismissal of the Indictment or for a continuance,
filed by deft.

9/29

Memorandum (Govt's) of Point and Authorities in
Response to Motion for Disclosure of Address of
Informant or for Dismissal of Indictment or for
Continuance, filed by govt.10/20
" "Motion to Suppress, filed by deft.
Deft. Submission of Voir Dire Questions, filed.

10/19

On RCZ's Jury Assignment List: Ready. Zampano, J.
m-10/19/76

10/20

JURY TRIAL COMMENCES: 11:00 A.M. 41 jurors
present. Oath on Voir Dire administered. Court
describes case to the jury. Excused for cause one
juror. Deft. allowed fifteen challenges and
govt. allowed six challenges. Twelve juror and
two alternates impanelled and sworn. Evidence to
begin on 10/27/76. Motion to Suppress to be heard
during the trial. 12:05 P.M. Court adjourned.
Zampano, J. m-10/21/76.

10/21

Marshal's return showing service: Subpoena to
Testify

10/27

JURY TRIAL CONTINUES: Deft's Motion for Determination
of Admissibility of Prior Convictions, filed.
Deft's request to charge, filed. Govt's request
to charge, filed. Deft. Motion to Sequester all
witnesses, granted. 10:55 A.M. 14 jurors present.
One govt. witness sworn and testified. Govt. Exs.
one through 14 filed. 12:27 P.M. Jury excused until
10:30 A.M. of 10/28/76. In the absence of the jury.
One govt witness sworn and testified. Deft's
motion to suppress statement-denied. 12:45 P.M.
Court adjourned to 10:00 A.M. of 10/28/76.
Zampano, J. m-1027/76.

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

DATE 1976	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DEL		
		(a)	(b)	(c)
10/28	JURY TRIAL CONTINUES: 10:15 A.M. Govt's response to Motion for Determination of Admissibility of Prior Conviction, filed. Hearing held on Deft's reopened Motion to Suppress. Two deft. witnesses sworn and testified. Decision reserved. Hearing on Deft's Motion for Determination of Admissibility of Prior convictions granted w/o prejudice to the govt. to renew as to 1961, 1962 and 1969 convictions; 1975 conviction maybe used by the govt. w/o prejudice. Continued hearing on Motion to Suppress. One govt. witness sworn and testified. Motion denied. 11:29 A. M. Govt. witness sworn and testified. Govt. Ex. 11, filed. 11:59 A.M. Govt. rests. At side bar Oral Motion for Judgment of Acquittal denied. Three deft. witnesses sworn and testified. Deft. sworn and testified on his own behalf. Deft. Ex. A, filed. Deft. rests at 4:25 P.M. No rebuttal Evidence. 4:26 P.M. Jury excused until 10:30 A.M. of 10/29/76. Deft's Oral Motion for Judgment of Acquittal, denied. Court discusses charge to the jury. 4:35 P. M. Court adjourned. Zampano, J. m-10/29/76.			
10/29	JURY TRIAL CONTINUES: 10:40 A.M. Court Ex. 1, marked for ID. 10:45 A.M. 14 jurors present. Court voir dires panel re: publicity. 10:49 A.M. to 11:12 A.M. Govt. opens. Deft. closes 11:12 A.M. to 11:28 A.M. Govt. closes 11:28 to 11:38 A.M. Deft's Motion for Mistrial or in the alternative Judgment of Acquittal denied. Courts charge 12:01 to 12:23 P.M. Alternate jurors excused. Jury retires to the jury room. No exceptions taken to charge. 12:29 P.M. All full exhibits and the Indictment taken to the jury by the Marshal and deliberations begin. 2:35 P?M. Note from the jury requesting testimony to be read. 2:41 P.M. to 2:42 P.M. Court reporter reads testimony requested. Court Ex. 2 marked for ID. 2:52 P.M. Jury returns Quilty verdict. Jury polled at request of deft. Verdict verified and ordered recorded. 2:55 Jury excused subject to call. Same bond to continue. 2:56 P.M. Court adjourned. Zampano, J. m-10/29/76.			
11/2	Court Reporter's Notes of Proceedings (trial) held on 10/28/76 and 10/29/76, filed. Russell, R			
11/3	Court Reporter's Notes of Proceedings (trial) held on 10/27 and 10/28/76, filed. Russell, R.			

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELA		
		(a)	(b)	(c)
1976	(Document No.)			
12/14	DISPOSITION: Impr. three years on Ct. one. Execution of sentence is stayed pending appeal with same bond. Deft. advised of his right to appeal. Zampano, J. m-12/14/76.			
12/17	Judgment and Commitment, fil. i and entered. Zampano, J. Two cert. copies handed U. S. Marshal. m-12/17/76.			
12/20	Notice of Appeal, filed by deft.			
12/23	Certified copy of Notice of Appeal and docket entries mailed to the Clerk, U.S.C.A.			
12/29	CJA Form 23 (financial affidavit), filed by deft.			
12/20	Court Reporter's Sound Recording of Proceedings (DISP) held on 12/14/76, filed. Russell, R.			
1977				
1/4	Court Reporter's Notes of Proceedings (DISP) held on 12/14/76, filed. Russell, R.			
1/6	CJA Form 21 authorizing transcript of Proceeding (trial), filed. Zampano, J. copies distributed.			
1/7	JS-3 mailed to A.O.			
1/7	Record on Appeal sent U.S. Ct. of Appeals. Copies of Index sent counsel.			
1/13	CJA Form 21 authorizing payment of \$146.50 to Eugene Russell, Court Reporter, filed. Zampano, J. copies distributed.			
1/14	Receipt of documents acknowledged by Clerk, U.S.C.A. and filed.			
1/17	Copy of Scheduling Order from U.S.C.A., filed and entered. Fusaro, C. m-1/17/77.			
1/19	Court Reporter's Transcript of Proceedings (trial) and (disp) held on Oct. 27, 28, 29 and Dec. 14, 1976, filed. Russell, R.			
1/24	Supplement to Record on Appeal(transcript) sent USCA. copies of Index to counsel.			
1/31	Receipt of Supplement to Record on Appeal acknowledged by Clerk, U.S.C.A.			
2/1	Court Reporter's Transcript of Proceedings (Summation and Court's charge) held on 10/29/76, filed. Russell, R.			
2/2	CJA Form 21 approving payment in the amount of \$158.50 to Eugene Russell, Court Reporter, filed. Zampano, J.			

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :
- versus - : Criminal Action
JAMES APUZZO : No. N-76-54
-x

United States Court House
New Haven, Connecticut
October 29, 1976

B e f o r e:

Hon. ROBERT C. ZAMPANO, U.S.D.J.

Jury Charge

664 PROJECT AVENUE
MARTINSVILLE, CONNECTICUT

SANDERS, GALE & RUSSELL
Certified Stenotype Reporters

141 CHURCH STREET
NEW HAVEN CONNECTICUT

1 2

2 THE COURT: Ladies and gentlemen, you have
3 heard the evidence presented in this case. You have heard the
4 summations of the government attorney and the lawyer for the
5 defense . And now, in the orderly course of the trial, we come
6 to what is known as the charge: That is, the instructions of law
7 which it is my duty to give you.

8 It is exclusively the function of the Court
9 to set forth the rules of law which govern the case, with in-
10 struction as to their application. On these legal matters you
11 must take the law as I give it to you; you are not at liberty
12 to do otherwise.

13 On the other hand, you members of the jury are
14 the sole and exclusive judges of the facts.

15 It is your duty to find the facts. You are to
16 recollect and weigh the testimony and draw your own conclusions
17 as to what the ultimate facts are. But you may not go outside
18 the evidence to find the facts, nor resort to guesswork, con-
19 jecture or suspicion.

20 You are to apply the law, which the Court gives
21 to you as to the facts as you find them, and, in this way, you
22 will render your ultimate verdict.

23 Now, as you know, this case involves a criminal
24 charge brought by the government against the defendant, James
25 Abuzzo.

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664 TRUMBULL AVENUE
HARFORD CONNECTICUT

The federal law with which we are concerned is
Title 18, United States Code, Section 922(a)(1) which reads in
pertinent part as follows: It shall be unlawful for any person,
except a licensed dealer, to engage in the business of dealing
in firearms.

This charge of violation of federal law by the
defendant is set forth in an indictment.

Before I read the indictment to you, I should
like to point out the function of an indictment.

An indictment by a grand jury is the formal method
of accusing this defendant of a certain crime. It merely de-
fines the crime charged and the manner of its alleged accom-
plishment. The indictment is without bearing or significance
in your consideration of this case and it is to be accorded no
weight by you in determining the guilt or innocence of this de-
fendant. By his plea of not guilty, the defendant has denied
each and every allegation set forth in the indictment.

The indictment in relevant part reads as follows:
"The grand jury charges that beginning on or about the 26th
day of February, 1976 to on or about April 6th, 1976, in the
District of Connecticut, James Apuzzo knowingly did engage in
the business of dealing in firearms without being licensed to
do so under provisions of federal law, in violation of federal
law."

Now, there are two general types of evidence which you may consider. One is direct evidence --such as the testimony of eyewitnesses. The other is circumstantial evidence --the proof of the commission of the offense.

Circumstantial evidence may be received and is entitled to such consideration as you may find it deserves depending upon the inferences you think it necessary and reasonable to draw from such evidence. No greater degree of certainty is required when the evidence is circumstantial than when it is direct, for in either case the jury must be convinced beyond a reasonable doubt of the guilt of the defendant. Circumstantial evidence consists of facts proven from which the jury may infer by a process of reasoning other facts sought to be established as true.

Different inferences, however, may be drawn from the facts and circumstances in the case, whether proved by direct or circumstantial evidence. The prosecution asks you to draw one set of inferences while the defendant asks you to draw another. It is for you to decide and for you alone, which inferences you will draw from the proven facts.

The burden to prove the defendant guilty of the crime with which he is charged is upon the government. The defendant does not have to prove his innocence. This means that the government must prove beyond a reasonable doubt each and

every element necessary to constitute the crime charged.
Whether the burden of proof resting upon the government is sustained, depends not on the number of witnesses, nor on the quantity of the testimony, but on the nature and qualify of the testimony.

In this case, ladies and gentlemen, as in all criminal prosecutions, the defendant is presumed to be innocent until proven guilty beyond a reasonable doubt. This presumption of innocence was with this defendant when he was first presented for trial in this case. It continues with him through this trial. As far as you are concerned the defendant is innocent, and he continues to be innocent unless and until such time as all evidence produced here in the orderly conduct of the case, considered in the light of these instructions of law, and deliberated upon by you in the jury room, satisfy you beyond a reasonable doubt that he is guilty. Thus, the presumption of innocence alone is sufficient to acquit the defendant unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all the evidence in the case.

Now, a reasonable doubt means a doubt founded upon reason. As the words imply, it is a doubt as will be entertained by a reasonable person after all the evidence in the case is carefully analyzed, compared and weighed by you. A reasonable doubt may arise not only from the evidence produced,

but also from a lack of evidence. Since the burden is upon the
3 government to prove a defendant guilty beyond a reasonable doubt
4 of every essential element of the crime charged, a defendant has
5 the right to rely upon a failure of the prosecution to establish
6 such proof. However, absolute or mathematical certainty is not
7 required, but there must be such certainty as satisfies your
8 reason and judgment and such that you feel conscientiously bound
9 to act upon it. It is not a fanciful doubt, or a whimsical or
10 capricious doubt, for anything relating to human affairs and
11 depending upon human testimony is open to some possible or im-
12 aginary doubt. Reasonable doubt is the kind of a doubt upon
13 which reasonable men and women like yourselves, in the more
14 serious and important affairs in their own lives, would hesitate
15 to act. On the other hand, if all the evidence has been im-
16 partially and thoroughly reviewed by you and it produces in your
17 minds a settled and abiding conviction as you would be willing
18 to act upon in matters of the highest importance relating to
19 your own affairs, then and in that event, you would be free from
20 a reasonable doubt. In other words, if the evidence warrants in
21 your judgment the conclusion that a defendant is guilty so as to
22 exclude every other reasonable conclusion, you should declare him
23 to be guilty. On the other hand, if on all the evidence, you have
24 a reasonable doubt as to the guilt of the defendant, you must find
25 him not guilty.

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Now, as you know, the defendant is accused of knowingly engaging in the business of dealing in firearms from on or about February 26, 1976 to on or about April 6, 1976. This offense has certain elements which I am about to describe to you. The government has the buren to prove each one of the essential elements to constitute the crime charged.

There are two essential elements which the government must prove beyond a reasonable doubt to establish the crime charged in the indictment. If you find the government has not sustained its burden of proof with regard to any one of the essential elements, then the defendant must be acquitted of the crime charged.

The two essential elements are: First, that from on or about February 26, 1976 to April 6, 1976 in the District of Connecticut, the defendant, James Apuzzo, knowingly did engage in the business of dealing in firearms; and, second, that the defendant during that period of time was not a federally licensed dealer in firearms.

The offense is complete only if both these essential elements has been proven beyond a reasonable doubt. I am not going to review the factual evidence and claims of the parties with respect to each essential element of the crime charged. The trial was a very short one, not complex and I am sure the factual contentions are quite fresh in your minds.

Moreover, the attorneys carefully reviewed the facts in their summations, and I do not intend to tax your patience or your intelligence by repeating them here.

However, to aid you in your deliberations, I will define certain terms and phrases for you which are used in the indictment.

The term "firearm" includes any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.

The term "knowingly" means wilfully, voluntarily and purposely and not because of mistake, inadvertence, or other innocent reason. Now, knowledge need not be proved by direct evidence -- for, as a general rule, a person does not proclaim or publicly announce his state of mind at a time an incident occurs. It is obviously impossible to ascertain or prove directly the operations of the mind. However, a careful and intelligent consideration of the facts and circumstances shown by the evidence may enable you to infer with a reasonable degree of accuracy what a person's knowledge was or his intentions were in doing or not doing certain things. With a knowledge of definite acts or facts, and by considering all the surrounding circumstances, the jury may draw definite, logical inferences on this issue.

It is also appropriate for me to point out that it is not necessary for the government to prove that the defendant had knowledge that engaging in the business of dealing in

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firearms without a license was a violation of federal law.

In other words, on this issue of knowledge, while the government must prove that the defendant knowingly did engage in the firearms business without a license, it need not prove to sustain a conviction that the defendant had knowledge at the time that his conduct was a violation of federal law or that at the time he had the specific intent to violate federal law by his conduct.

The term "business" means that activity which occupies time, attention and labor for the purpose of livelihood or profit. However, in this regard, the government need not prove that the defendant's primary business was dealing in firearms or that the dealing in firearms actually was profit-making for the defendant.

The term "dealer" means any person who is engaged in any business of selling firearms at wholesale or retail.

The term "licensed" or "Licensed dealer" means any person who has a federal license to engage in the business of selling firearms.

It is appropriate for me at this time to discuss the defense of entrapment. Now, as you know, the defendant claims that he was the victim of entrapment as to the crime charged in the indictment.

The defense of entrapment is available to Mr.

10

2 Apuzzo if you find that he was induced or enticed to commit the
3 crime here which he would not otherwise have committed. Where
4 a person has no previous intent or purpose to violate the law
5 but is induced or persuaded by law enforcement officers, or
6 their agents, such as a government informant, to commit a crime,
7 he is a victim of entrapment and the law, as a matter of policy,
8 forbids his conviction in such a case.

9 On the other hand, where a person already has the
10 readiness and willingness to break the law, the mere fact that
11 the government agents or their informants provide what appears
12 to be a favorable opportunity to do so, then there is no entrap-
13 ment. This is so because the right to resort to undercover
14 agents or informants in order to detect and apprehend a violator
15 of the law so long as they do not entrap him.

16 Thus, two questions are presented for your con-
17 sideration and decision on this issue. First, did the agent,
18 or agents, or informant induce the defendant to commit the of-
19 fense charged in the indictment? Second, if so, was the defendant
20 ready and willing without persuasion and was he awaiting any
21 opportunity to commit the offense?

22 If you find that the defendant has adduced some
23 evidence that he was induced to commit the crime, then the
24 government has the burden of proving beyond a reasonable doubt
25 that the defendant was not entrapped, that is, that he did not

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444 PROSPECT AVENUE
HARTFORD, CONNECTICUT

11.

2 need any persuasion and was ready and willing to commit the of-
3 fense whenever the opportunity offered.

4 In other words, to sustain its rebuttal of the
5 defense of entrapment, the government must satisfy you beyond
6 a reasonable doubt that its agents or informant did not
7 seduce an innocent man, but that the transaction or transactions
8 which the defendant engaged in that resulted from the govern-
9 ment's action was the kind or kinds of conduct that the de-
10 fendant was prepared to engage in, if given the opportunity.

11 In summary, if you find that the defendant adduced
12 some evidence that the government agents or informant induced
13 him to commit the acts in question and if the evidence in the
14 case should leave you with a reasonable doubt whether the
15 defendant had the previous intent or purpose to commit the
16 offense charged and did so only because he was induced or per-
17 suaded to commit the offense by a government agent or informant,
18 then it is your duty to acquit him.

19 On the other hand, if you find that the govern-
20 ment proved beyond a reasonable doubt that the defendant was
21 predisposed and willing to commit the crime and that the agents
22 or informant merely gave him the opportunity to do so, and if
23 you find that the government proved all the essential elements
24 of the crime charged as I have previously discussed with you,
25 then it is your duty to find the defendant guilty.

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44 PROSPECT AVENUE
HARFORD, CONNECTICUT

2 The factual issues have been framed for your con-
3 sideration by the parties; it is for you to decide.

4 Now, in performing your function, one of the
5 most important things you have to do is pass upon this matter
6 of credibility, that is, the "believability," of the various
7 witnesses who have appeared before you. In passing on the
8 credibility of each of the witnesses, there are certain con-
9 siderations you might keep in mind. One of these is the ap-
10 pearance which the witness made when he was on the stand; you
11 should try to size him up. Did he appear to be telling the
12 truth? Did he appear to be honest? Did he appear to be in-
13 telligent? That is, did he appear to be a person who could
14 have observed accurately what he is telling you about; who would
15 be likely to have remembered it accurately, and who was capable
16 of reporting it to you accurately?

17 Another question for you to have in mind re-
18 garding each witness is the question as to whether the story he
19 has told you is plausible. Does it ring true, or are there
20 inconsistencies in it? How does it fit in with other evidence
21 in the case which you do believe and other facts you find to
22 have existed? Does it jibe with that evidence and those facts?
23 In short, does the testimony which was given by the particular
24 witness whose credibility you are considering seem to you to be
25 plausible? You have the right to reject testimony even though

it is uncontradicted, if you feel you have a justifiable
reason for doing so.

Another question you may well ask yourself in passing on the credibility of any witness is as to whether that witness has any bias or interest in the outcome of the case, and if so, whether he has permitted that bias or interest to color his testimony. In short, you are to bring to bear upon it the same considerations and use the same sound judgment you apply to questions of truth and veracity which are daily presenting themselves for your decision in the ordinary affairs of life.

Testimony given by a government law enforcement agent is entitled to no special or exclusive sanctity merely because it comes from a government agent. The testimony of each such federal agent who takes the witness stand, is subject to the same examination and the same tests as the testimony of any other witness.

With respect to the testimony of the defendant, you should test his credibility under the same principles you apply to the other witnesses. An accused person is not obliged to take the stand in his own behalf. On the other hand, he has a perfect right to do so, as this defendant has done. A defendant, having taken the witness stand, is before you just as any other witness. Therefore, his testimony should be measured

14

2 in the same way as any other witness. With respect to the evi-
3 dence that the defendant was convicted of a crime, I instruct
4 you that this is merely a circumstance which you may consider
5 in determining his credibility. It is the province of the jury
6 to determine the weight to be given to any prior conviction as
7 impeachment. Incidentally, the possession and transportation
8 of untaxed cigarettes is not a felony therefore, of course, a
9 conviction on that charge would not make one a convicted felon.

10 With respect to the testimony of the witness Robin
11 Bourgeois, who admittedly received a sum of money from the
12 government for his services in this case, I instruct you that
13 the fact the government has made such arrangements with Mr.
14 Bourgeois does not in and of itself render his testimony incom-
15 petent or not entitled to be believed. However, on the issue of
16 credibility, it is the law that the testimony of a witness who
17 provides evidence against a defendant for pay or personal ad-
18 vantage, must be examined with greater caution and care than
19 the testimony of a disinterested witness. It is the province of
20 the jury to decide whether or not such witness' testimony has
21 been affected by pay or personal interest.

22 Another matter I should mention at this time is
23 that the question of punishment in the event of a conviction
24 should not enter into or influence your deliberations. The duty
25 of imposing sentence in the event of a conviction rests exclusively

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2 upon the Court.

3 In conclusion, members of the jury, I impress
4 upon you that you are duty-bound as jurors to apply the law,
5 as you have been advised by the Court, to the facts of this
6 case, as you find them.

7 Now, take this case with you to the jury room.

8 Determine the facts on the basis of the evidence, as it has
9 been presented to you; apply the law as I outlined it to you;
10 then render your verdict fairly, uprightly, and without a scin-
11 tillia of prejudice.

12 When you reach your verdict, it must be unanimous.
13 It is the duty of each juror to discuss and consider the opinions
14 of the other jurors. Despite that, in the last analysis, it is
15 your individual duty to make up your own mind, and to decide this
16 case upon the basis of your own individual judgment and conscience.

17 With that, the jury may retire to the jury room.
18 Elect a foreman or forelady. Proceed to your consideration of
19 the case. When you have reached your verdict, inform the Clerk
20 through the Bailiff. Then return to the courtroom and announce
21 your verdict.

22 At this time I would like to excuse the alternates.
23 I know it is somewhat of a disappointment to sit on a case and
24 not be with your colleagues when they arrive at a verdict. How-
25 ever you did perform an important function, because if one of

16

the regular jurors, one of the twelve, was absent, then we
would have had a mistrial unless we had alternates.

Now, I believe lunch has been brought in. If
you would like to stay for lunch, we can get another room for
the two alternates. Then, after lunch, you just leave the
building.

That reminds me. If you are in your deliberations when lunch is brought in, and it should be brought in about 12:30, stop your deliberations while the marshals are in there. Just hold off. As soon as they leave, then you can start up, if you want, during lunch. In other words, don't deliberate if someone else is in the room other than the twelve.

With that, you are excused, proceed to your deliberations, and when the exhibits are brought in, then start your deliberations.

(Jury retired at 12:25 p.m.)

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ACROFILM United States District Court
FOR THE

DEC 17 1976

DISTRICT OF CONNECTICUT

FILED
Dec 17 1976THE UNITED STATES OF AMERICA
v.
JAMES APUZZONo. N-76-54 Criminal
*JK*NEW HAVEN, CT
COURT

On this 14th day of December, 1976 came the attorney for the government and the defendant appeared in person and by counsel

IT IS ADJUDGED that the defendant upon his plea of² not guilty and the jury having returned a verdict of guilty has been convicted of the offense of Title 18, Sections 922(a)(1) and 924(a), of the United States Code (knowingly did engage in the business of dealing in firearms without being licensed to do so)

as charged³ in Count One and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of⁴ three (3) years on Count One.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Robert C. Zampano
United States District Judge.

The Court recommends commitment to "

Clerk.

¹ Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." ² Insert (1) "guilty" and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. ³ Insert "In count(s) number _____ if required Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. ⁴ Enter any order with respect to suspension and probation. ⁵ For use of Court to recommend a particular institution.

1 the jury has to say? Bring in the jury.

2 (Jury entered courtroom at 10:45 a.m.)

3 THE COURT: Good morning, ladies and gentlemen. Before
4 we proceed to the summations, there's one question I should ask
5 each jury. You may recall that I informed the jury they should
6 not discuss this case with anyone or read anything about it,
7 and I hadn't seen anything in the newspaper until last night, and
8 I am wondering if you noticed the headline in the Register or
9 any other newspaper, and if any of you then continued to read it
10 or noticed the headline or anything like that about this case?
11 There was an article last night. So I take it your minds are
12 completely open and you are only going to decide this case on the
13 evidence that you hear in court.

14 All right. Now, ladies and gentlemen, we're coming
15 to the summations. Obviously, the attorneys must refer to the
16 facts, but if your recollection of the facts differ from theirs,
17 it is your recollection that counts and, obviously, they must
18 refer to the law in trying to convince you to accept their side
19 of the case, and you should listen attentatively, but if their
20 version of law should differ from mine, in a few minutes, when
21 I charge the jury, then you must accept my version of it.

22 So what we'll do, we'll hear the summations, I'll
23 take a brief recess to put my charge together, I'll charge you,
24 and then it should be just about lunch time, lunch should be
25 brought in, and I will go over that in my charge, what you should

1 do when lunch comes in.

2 All right -- oh, one thing I should mention. The
3 government has the opening and closing. That means the govern-
4 ment opens its argument, the defendant responds, the government
5 has a very short rebuttal.

6 Now, that's not because the attorneys flipped a coin
7 or anything. It is, under our system of jurisprudence, the
8 government must prove each and every essential element of the
9 crime charged beyond a reasonable doubt, it has to convince
10 twelve of you, so because the government has the burden of proof
11 under our system of jurisprudence, we allow the government a
12 short rebuttal after the defendant argues.

13 You may proceed, Mr. Cuthbertson.

14 MR. CUTHBERTSON: Thank you, your Honor.

15 Good morning, ladies and gentlemen. As you may remember,
16 I introduced you -- myself to you. My name is Hugh Cuthbertson.
17 I'm an Assistant United States Attorney, and I presented the
18 case on behalf of the government.

19 On behalf of the government, I'd like to thank you
20 for your attention during these few days. It hasn't been a
21 particularly long trial, but it is a criminal trial and it is an
22 important case. It is an important case for the defendant,
23 obviously, but it is also an important case for the government,
24 because whenever a crime has been committed, the government is
25 very concerned, and as Judge Zampano told you, this stage of

1 the trial is not evidence. I'm presenting no evidence. What
2 I say is not evidence. What Mr. Bowman says at this point is
3 not evidence. The evidence has already been submitted. It
4 came in through the testimony of the various witnesses. Evidence
5 is in the form of the exhibits in front of you, and that's
6 what you must consider in this case.

7 Additionally, I may refer to the law when I talk to you
8 this morning. But what I say about the law is not controlling.
9 Judge Zampano is going to instruct you on the law, and that's
10 what's controlling, and please listen to him carefully after our
11 arguments.

12 Now, the charge in this case is one of engaging in
13 the business of dealing in firearms. The indictment specifically
14 charges the defendant with having dealt or engaged in the business
15 of dealing in firearms between February 26th, 1976 and April 6th,
16 1976.

17 Now, there's been some evidence in this case of trans-
18 actions which occurred prior to February 26th. There have been
19 exhibits which were introduced concerning those transactions.
20 The government is not charging the defendant with engaging in
21 the business of dealing in firearms prior to February 26th.
22 I want to make that perfectly clear. Those transactions, however,
23 are not irrelevant. Because as, in this case, the defendant is
24 presenting a defense which we call entrapment, and I will get
25 to that in a minute, but when you are considering the defense

of entrapment, you are going to be considering the defendant's predisposition to commit the crime. Then, I submit any prior transactions are highly relevant.

And you are also going to be judging the credibility of witnesses in this case. And with respect to the credibility of witnesses, I submit the prior transactions, what the various witnesses said about those transactions, and what the defendant said about those transactions, are highly relevant. And I want you to consider all that evidence with respect to credibility and with respect to the question of entrapment. But not with respect to the question of whether he was dealing in firearms prior to February 26th, because he's not charged with that.

There are essentially two elements of the offense of engaging in the business of dealing in firearms which the government has to prove beyond a reasonable doubt. The first element is that the defendant did, between February 26 and April 6, 1976, knowingly engage in the business of dealing in firearms; and the second element is that during those two times, he was not a federally licensed dealer in firearms. Those are the two elements that we're concerned with.

Let me take the second element first, because there's less to be said about it. You will recall the government introduced Exhibit No. 11, which is a certificate from the Department of Treasury, which states that the defendant has never executed or filed applications for firearm licenses under federal

1 law. This does not appear to be a question which is in any
2 serious dispute. He doesn't have a license to deal in firearms.

3 So let's consider the first element. Was he dealing
4 in firearms? And I would ask you to recall the evidence which
5 the government presented to you beginning with February 26th,
6 1976. You heard Special Agent Petersen and you heard Special
7 Agent Watterson of the Bureau of Alcohol, Tobacco and Firearms
8 both testify that on that date, four o'clock in the afternoon,
9 they met with the defendant at the Howard Johnson's in New
Haven, Sargent Drive. They first met him there, then they moved
over to a building near the Yale Commissary.

10 What happened on that occasion? The defendant sold
11 them two guns, Government Exhibit 1 and Government Exhibit 2.
12 Sold them two guns for \$275. The agents were specific as to the
13 date, the time, the place, the amount that was paid for the rifles.
14 They had the rifles that were bought. They made a notation of
15 the serial number. No question that these are the rifles that
16 they bought on February 26th, 1976.

17 They recorded the conversation after the meeting.
18 And what was that conversation? Defendant asked them, "Are you
19 interested in pistols? Would you be interested in 30 pistols?"

20 What did Special Agent Watterson reply? "We don't
21 want any junk."

22 What did the defendant say? "Well, the pistols are
23 used, but they're in good shape."

What did Special Agent Watterson reply? "Well, we'll give you a price when we see the whole lot."

Those pistols were never bought by the two agents from the defendant. But I submit that it is very clear evidence of the defendant's ability to get firearms, his willingness to deal, in addition to the tangible evidence you have here of the two firearms which he did sell.

You've got two rifles, you've got conversation about pistols. Thirty pistols.

Special Agent Petersen testified that he called the defendant on March 6, 1976. Again, specific to the date, the time, 11:45 a.m.

What occurred in that conversation? The defendant said, "I had a couple small handguns, but I didn't think you'd be interested in them, so I got rid of them. But I'm waiting for a friend who's going to have five .44-Magnum revolvers."

He's not dealing in firearms. Thirty pistols. Five .44-Magnum revolvers. He's telling the agent, "There's a possibility I can get this. Hold off. Wait."

March 22nd, Special Agent Petersen testifies he calls him back again. What did the defendant say? "I don't have the pistols yet, but call me back."

Well, he never got those pistols. I think the conversation is very significant. Again, ability to get -- at least a stated ability to get pistols.

Special Agent Petersen testified that on April 5th he called him again. What did the defendant say? "This time I've got eight firearms that I can sell to you." They range --- they arrange a meeting, April 6th, the same place. Howard Johnson's, Sargent Drive in New Haven. 2:30 in the afternoon. Special Agent Petersen attended, Special Agent Watterson attended. \$550 was paid for eight firearms. These eight firearms right here, Government Exhibits 3 through 10.

And what did he say about these firearms? With respect to this Colt Cobra pistol? He could sell a hundred of them if he had 'em. A hundred. He's not dealing in firearms.

oh, no.

What did he say about the Smith and Wesson? "I'm going to throw it in for the deal."

The agents asked him, "Are any of these guns hot?
Could they be traced?"

ANSWER

"No, they can't be traced. Yes, they are hot."

Well, with respect to this pistol, you saw Special Agent Petersen dismantle it on the stand. The serial number was obliterated on the outside. But he found a serial number on the inside.

Special Agent Petersen asked him, "What happens if somebody gets caught with these?"

Defendant says, "He's in trouble."

After his arrest, he's taken to the marshal's office.

1 Special Agent Watterson talks to him. "Do you have anything
2 to say about all of this?"

3 "Well, I thought it was legal."

4 Judge Zampano is going to instruct you that it doesn't
5 matter what he thought it was. Because his intent as to the
6 violation of the law is irrelevant. He doesn't have to know
7 there's a federal law which prohibits what he's doing.

8 And listen to his instruction on that element of the
9 law. His knowledge of the federal law, his intent to violate
10 the federal law is irrelevant. It is not an element of this
11 offense.

12 So what does he say to Special Agent Peterson? "Well,
13 I bought it from somebody in the Penny Saver" -- excuse me --
14 to Agent Watterson.

15 What did Special Agent Watterson say? "Would you
16 care to tell me whose name you bought it from? Who the person
17 was?"

18 What does Watterson say?

19 Defendant smiles, says, "We're wasting each other's
20 time."

21 That's the evidence the government presented you of
22 the defendant's dealing in firearms. His engagement in the busi-
23 ness of dealing in firearms between February 26 and April 6.

24 What does the defendant have to say? Well, initially,
25 he's going to say he was entrapped. "I wouldn't have done this

1 if the federal agents hadn't twisted my arm. Pushed me into it.
2 I didn't mean to do it.

3 Well, the law of entrapment -- and listen to Judge
4 Zampano's instruction on the law -- says that the government
5 cannot manufacture a crime. It is true. It is not the purpose to
6 make up crime that doesn't exist. The government can't lure someone
7 into the commission of a crime which he had not contemplated or
8 which he wouldnot otherwise have committed.

9 However, if an individual is ready and willing to
10 commit an offense, and he's merely awaiting a favorable opportunity
11 to commit it, and the government furnishes him that convenient
12 opportunity, he's not entrapped. In that type of a situation,
13 the government does not seduce an innocent person. He's
14 providing -- the government is providing the means for the
15 defendant or another criminal to carry out an already existing
16 criminal purpose.

17 And the key is the defendant's predisposition to commit
18 the crime. Go back and reconsider the evidence between February
19 26th and April 6th, listen to those conversations. "Are you
20 interested in thirty pistols? Five .44-Magnum revolvers?"

21 The evidence between those dates, I submit, is over-
22 whelming that the defendant was ready, willing and predisposed
23 to commit the crime of unlicensed dealing in firearms.

24 But you don't just have to consider February 26th
25 and April 6th. And this is where the prior sales are important.

1 You recall Robin Bourgois was testifying about the first sale.
2 November 1st and prior to the first sale, he tried to set up a
3 sale with Special Agent Petersen and the defendant. Prior to
4 November 1st, but the defendant was so eager to sell the guns,
5 the sale didn't come off. He sold them to somebody else for
6 money.

7 Then we come to November 1st. Sells Agent Petersen
8 a Mossberg for \$75. Tells the agent the gun's hot. Asked him,
9 "Do you want more?"

10 Well, if he's willing to give more, and if he indicates
11 his willingness and ability to get more, obviously, the agent is
12 going to say sure.

13 It is not entrapment. He's predisposed to commit the
14 crime. The agent is giving him an opportunity to commit it to
15 see if he's going to commit it.

16 On December 10th, two more rifles are bought. Agent
17 Petersen testified that he asked the defendant; "Do you have more?"

18 What was his answer? "Yes. Can you handle a case?"

19 Agent Petersen, "What do you mean by a case?"

20 "Twelve."

21 That's not predisposition to commit a crime? I submit
22 the evidence, not only between February 26th and April 6th, is
23 overwhelming, but consider those prior transactions. Consider
24 what the defendant said to the agents. What they recorded him
25 as having said, and their notes which were specific as to date,

1 as to time, as to the occurrence, which weapons were sold, the
2 serial numbers.

3 Beyond entrapment. Beyond the defendant saying, "I
4 wouldn't have done it. They pushed me into it." He has a few
5 denials of what actually happened.

6 Now, we're getting to the issue of credibility.

7 Because in order for you to believe the defendant's story, as he
8 asks you to, you are going to have to disbelieve not only the
9 testimony or Robin Bourgeois, but you are going to have to
10 disbelieve the testimony of Special Agent Watterson and Special
11 Agent Petersen. Because the defendant denies the aborted sale
12 before November 1st. He denies the November 1st sale. He denies
13 the February 26th sale. He denies all the conversation that
14 was recorded. He denies the telephone calls in March. He
15 doesn't deny the sale on April 6th. How can he? He was
16 arrested. He has to admit that.

17 This is not a difference in the interpretation as to
18 how events transpired and to how things were said, there is a
19 major dispute between what happened. Was he there on February
20 26th? He says no. It never happened.

21 You heard Special Agent Watterson and Petersen testify
22 that it did happen. They were both there. Are they lying? Is
23 that what he wants you to believe?

24 And, ladies and gentlemen, if you disbelieve the
25 defendant as to any material fact -- and I would submit in this

case the material facts would be any of the transactions, the conversations -- if you disbelieve him as to any of those material facts, you are entitled to disbelieve his entire story.

Between February 26th and April 6th, 1976, the defendant was engaged in the business of dealing in firearms. It may not have been his primary business, but listen to Judge Zampano's instruction on the law. It doesn't have to be his primary business. Any business. He may have been doing other things, but he was selling firearms.

He admits he sold them on April 6th. He needed the money. He meets some man in Brantford a few days before. In the evening. He has to make ends meet at the end of the months. He needs money. Profit. He's selling guns for a profit. But listen to Judge Zampano. The law says you don't have to be selling them for a profit. It doesn't have to be your primary business. You can be doing other things.

Ladies and gentlemen, you heard the defendant testify, and you heard the testimony of a man who's been caught, and who's going to admit to you what he has to admit, or which he thinks he can get away admitting. He has to admit April 6th? How can he deny it, he was arrested, he was processed, he was brought before the magistrate?

That's what the case is all about. He figures he can get away with admitting a sale in December saying they were his brother-in-law's guns. We're not saying that they weren't. He's

not charged with the December transaction.

But I think you can see how the defense has approached this. Deny the February 26 sale. Deny the November 1st. Deny everything that you can get away with denying. And if you accept those denials, you are saying that two government agents, took notes, who testified as to certain transactions and conversations, lied to you. And I submit to you that's not the case.

And I would ask you when you deliberate, look at all the evidence. Do your duty as jurors and return a verdict of guilty as charged.

Thank you.

THE COURT: Mr. Bowman.

(Mr. Bowman made a closing statement on behalf
of the defendant.)

THE COURT: Mr. Cuthbertson.

MR. CUTHBERTSON: Well, Mr. Bowman mentioned a couple I think are worthy of response. First of all, I'm to apologize for the guns. That's what the case is the government is not going to hide them. That's what and what was sold. They're here. That's what the Firearms. We're not going to hide 'em outside in the you should see them. That's what was sold. That's what ral law is about. I'm not going to apologize to you ese firearms.

Mr. Bowman mentioned anybody can own these firearms.

Anybody cannot own these firearms. And Special Agent Petersen didn't testify to that effect. He said if you are a nonprohibited person. If you are not a convict. Convicted felons can't own firearms. Anybody can't buy these firearms. That's why there's a federal law. That's why the firearms business is regulated. It is to prevent this kind of thing, unregulated sales. At any time. To anybody. No questions asked.

The defendant was asked by Special Agent Petersen, "Can you get sawed-off shotguns?" Whether he did or he didn't is irrelevant. What does somebody want a sawed-off shotgun for? He didn't seem to care. He didn't ask the two agents -- he didn't know they were agents -- he didn't ask them what they were going to do with these guns. Sell'em to 'em.

That's why there's a federal law. Not anybody can buy these firearms.

Mr. Bowman would like you to believe that this case is all about the defendant and Robin Bourgeois. You disbelieve Robin Bourgeois, you have to believe the defendant.

That's not the case at all. It's a smoke screen.

Do you realize what the defendant said yesterday? When he testified? There weren't minor inconsistencies in the testimony. There were major inconsistencies. He didn't say just that, "Robin called me all the time," and Robin said, "No, I didn't." He denied entire transactions.

November 1, it never happened. "I wasn't there." What

1 Do you think Special Agent Petersen is testifying about? Think
2 about February 26th. You think Special Agents Petersen and
3 Watterson picked that date out of thin air? You think they
4 would say and make up a date? "Let's say February 26th. That
5 sounds goods. Let's make it Howard Johnson's."

6 Where'd they get the weapons? They make up all that
7 conversation? Think of their motive. Why would they do it?
8 That's an enormous risk for a federal agent to say pick a date
9 to frame a man. Let's say the 26th. He was there. Yes. It
10 was Apuzzo. We remembered him. Remembered the guns. How do
11 they know what he's going to say? How do they know he's not
12 going to come up with an alibi?

13 He was someplace else. He didn't tell us where he was.
14 He didn't bring anybody in to say, "I was someplace else on the
15 26th. I was someplace else on November 1st." But how could
16 they have known that? They're not picking dates out of the air.
17 They're not making up testimony. He was there on February 26th.
18 He sold them these two weapons. He told them about additional
19 30 pistols.

20 Mr. Bowman mentioned the Penny Saver. We're not
21 denying that people advertise in the paper to sell guns. I
22 don't think it is a proper inference for you to draw that all
23 those guns which are advertised are necessarily legal.

24 This isn't the paper that the defendant said he saw
25 the advertisement in. This is an October, 1976 paper. We don't

know what was in the paper that he says he saw. Special Agent
Watterson said he never told them that. He smiled, looked at him.
Said, "We're wasting each other's time."

Do you remember the testimony and the questions about
that incident? How old was the paper? Defendant says, "I was
arrested on the 6th. I guess I bought the guns on the 3rd."
Three days. Three days difference.

Mr. Bowman says this is a very important case for the
defendant. I agree. And if you are confronted with an important,
serious federal felony charge against you, do you think you are
not going to be able to go out and come up with that paper?
Three days? You say you bought it from somebody in Branford.
You recognize him. The paper is going to have a phone number.
How you got in contact with him. You can't find it? It's
preposterous.

What is his business? That's not entirely clear.
You listen to Judge Zampano's charge on the business of dealing
in firearms. Doesn't have to be his primary business. He
worked for the New Haven Register for a time. He paints. Some-
times. He's dealing in perfume, dealing in cigarette lighters,
dealing in snatchpurses, all for a profit.

MR. BOWMAN: That's not the testimony. It wasn't
snatchpurses. The word is clutchpurse.

MR. CUTHBERTSON: Clutchpurse. Purses. He was dealing
in purses for a profit. He wasn't dealing in firearms. No.

1 He doesn't deal in firearms. He wasn't there on February 26th.
2 Never happened. Two federal agents lied to you. They made it
3 up.

4 The defendant was not entrapped in this case, and when
5 you are thinking about the testimony concerning the question of
6 entrapment and his testimony, consider his credibility.
7 Consider what he told you about other events. Not just the
8 entrapment. About the fact that he wasn't even there. He
9 denies sales. Never happened. And if you disbelieve him as to
10 his testimony about the made upsales, then you are entitled to
11 disbelieve his other testimony.

12 Mr. Bowman is trying to put the government in a bad
13 light. They're picking on the defendant. The government doesn't
14 pick and choose people it prosecutes. That's not what happened
15 in this case.

16 You heard Special Agent Petersen talk to you about
17 informants. They're used. It is impossible for special agents
18 of the Bureau of Alcohol, Tobacco and Firearms to know everybody
19 in -- in different neighborhoods. How are they going to find
20 out what's going on? It is a wide-spread practice. Local. Both
21 federal. It is a normal law enforcement technique. For detect-
22 ing crime. And that's what happened in this case.

23 Claims Mr. Bourgeois didn't keep records. He's not
24 a federal agent. He doesn't have to keep records. His job is
25 to put them in touch with the defendant. Federal agents kept

the records. Think about that. Specific records as to time, conversations, serial numbers, what happened, and the defendant denies much of it. Think about that.

Ladies and gentlemen, when you have finished considering all of the evidence, again, I'm going to ask you to do your duty and to return a verdict of guilty, as charged.

THE COURT: Ladies and gentlemen, you are now excused for a brief recess. I want to get my charge together. I'll charge the jury in about 10 or 12 minutes.

(Jury left courtroom at 11:40 a.m.)

THE COURT: Recess court, Mr. Prete.

(Recess taken.)

THE COURT: Are the parties ready to proceed?

MR. BOWMAN: Your Honor, I have a motion to make with respect to the prosecutor's argument. I move for a mistrial, in the alternate, judgment of acquittal. The prosecutor specifically said in his argument that convicted felons cannot own firearms, and he made a special point of it. He did it twice. He emphasized it to the jury. And he cast the inference that the defendant was a convicted felon, something that we have specifically made an issue in this case, and that the Court has ruled upon. There's only one prior conviction in evidence, that is a misdemeanor conviction, and there's just no evidence at all that he's a convicted felon. I believe that is -- the comments that he made, and he made them twice, about convicted

can be interpreted by the jury as meaning that this defendant is a convicted felon.

I also object to his constant characterization of the defendant's testimony as preposterous. He's injecting his credibility into it, his own beliefs, and on that ground, I also move for a mistrial.

THE COURT: All right. Mr. Cuthbertson?

MR. CUTHBERTSON: The comments about a convicted felon had absolutely no reference to the defendant. I was talking generally about the law in response to Mr. Bowman's statements that anybody can buy weapons, or these weapons. Absolutely no intent to refer to the defendant. I don't think I did.

THE COURT: The motion is denied. First of all, the prosecutor was merely repeating evidence that had come in before the jury. Secondly, in context, at no time did I get the impression he was saying that the defendant was a convicted felon. As I recall the summation, he was referring to the point made that it is legal to sell these guns to anybody in the whole world regardless of their background, and I think he was referring to the purpose of the law, among other things, that that is just not so. You can't sell these guns to people who cannot own them by law, among those were convicted felons and others.

So I think in the context of the entire argument there

6

was no implication or inference that the defendant could not own
the gun. I don't think the prosecutor even insinuated that he
was a convicted felon. And lastly, there's no evidence that
he's a convicted felon, so, obviously, there can be no reference
to it, nor can the jury think he was. Because there is no evidence
of it. So, therefore, the motion is denied on that ground.

As far as proposterous, I think it was said twice.

But I don't recall Mr. Cuthbertson saying, "It is my belief that the claim is preposterous." He characterized the claim as preposterous, so I don't think there was any undue reference to characterizations which would warrant a mistrial or a judgment of acquittal.

And finally, the defendant's summation was quite competent, appealing, emotional, and the prosecutor was merely trying to respond to an excellent summation labeling the defendant's story preposterous . I don't believe that that was an improper approach under all the circumstances.

MR. BOWMAN: Excuse me, your Honor. May I just ask the Court to include in its charge on the -- with respect to the conviction on untaxed cigarettes that it is not a felony conviction? Just to make sure that the jury does not misunderstand. What the prosecutor was talking about.

THE COURT: Yes, I'll do that. What exactly was that charge? Sale of --

MR. BOWMAN: It was possession and transportation of

1 untaxed cigarettes.

2 MR. CUTHERPSON: Here's the charge, your Honor.

3 THE COURT: All right. Thank you.

4 All right. Bring in the jury, Mr. Prete.

5 (Jury entered courtroom at 12:00 noon.)

6 (Whereupon, the Court charged the jury.)

7 (Jury left courtroom at 12:25 p.m.)

go over the requests to charge --

MR. BOWMAN: Yes, your Honor.

THE COURT: -- and then your motion to prohibit the government from attempting to challenge the credibility of the defendant if he takes the stand with respect to prior convictions.

Is there anything else?

MR. BOWMAN: I believe those are the only two.

THE COURT: Why don't we proceed to the defendant's motion for determination of admissibility of prior convictions.

MR. BOWMAN: Your Honor, as I understand it, the government seeks to introduce a 1961 state conviction for aggravated assault and carrying a weapon in a motor vehicle, a 1962 federal conviction for possession of a sawed-off rifle, and a 1969 conviction for possession of stolen goods.

With respect to the '61 and '62 convictions, I believe that the Puco case stands for the proposition that where a prior conviction is stale, and, indeed, this one is 14 years old, this is 1976, these convictions were '61, '62, so that would be 14 and 15 years old, where they have little bearing on veracity, they're not crimes of dishonesty and where their propensity to influence the jurors because of the nature of the crime improperly is substantial, and I believe Puco stands for the proposition that these convictions should be excluded, and I stand on that proposition, and I believe that this case is consistent with the holding in Puco, and that I believe that it

would be error for the government to be allowed to impeach my client with these two convictions.

THE COURT: Mr. Cuthbertson.

MR. CUTHBERTSON: Your Honor, the government doesn't believe that the Puco case is controlling here, for several reasons. Number one, the convictions there were older than these convictions, it's a 14-year gap, not a 21-year gap. Secondly, in Puco, the Court made note of the fact that apparently since that 21-year old conviction, Puco had not run afoul of the law again, and I believe the Court took that into consideration, and that's not the case here.

We have evidence of other convictions since 1961 and '62.

THE COURT: Why do you want to introduce these convictions if he takes the stand?

MR. CUTHBERTSON: Well, in this case, since there's an entrapment offense to show that -- well, not to show anything -- to impeach his credibility on the fact that he may not have familiarity with firearms, he may not ever have had access to them.

I'm not sure what he's going to testify to. But I believe testimony along those lines may come out, and I think it is something the jury should know.

THE COURT: All right. I've read the briefs, and I have studied the cases, including the Christophe Second Circuit

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case cited by the government this morning.

My initial impression is that Puco is controlling, and there are similarities between that case and this that would compel the Court to prohibit the government from introducing these convictions on cross-examination if the defendant takes the stand. I do not think the gap between 14 years and 21 years is controlling. I think Judge Timbers there was referring to stale -- conviction, but also that it was highly prejudicial to the defendant to have a prior conviction which in some ways was related to the charge for which he was presently being tried on. And, obviously, that's so. If the defendant had a prior conviction in the firearms violation area, it is certainly prejudicial to a case that's being tried for similar violation some years later.

Also, we have to recognize in the meantime Rule 109 is now in effect, and there's no question, as you read the rule, that the 10-year cutoff point is a weighty guideline for the Court, and as I read the rule, it is in exceptional circumstances -- only in exceptional circumstances should the Court allow a conviction that's -- goes beyond 10 years. And in the case you cite this morning, Christophe, of course, it was only eighty years, and the Court said: well, that was within the Judge's discretion.

Now, this is not to say that you may not have a point later on to attempt to impeach him based on his testimony. Now,

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1 if he takes the stand, and if there's testimony that would be
2 attacked fairly, reasonably and properly by an introduction of
3 his prior convictions, I'll at that point hear you -- of course,
4 outside the presence of the jury.

5 So I'm granting the defendant's motion, but without
6 prejudice to the government to renew its request at the
7 conclusion of the defendant's testimony.

8 For example -- I know it is an extreme example, but
9 I gave you an example yesterday -- if the defendant took the
stand and his counsel said, "Have you ever been arrested in your
life?"

And he said, "No."

"Have you ever had any dealings with firearms?"

"No."

"Have you ever been convicted of a crime?"

"No."

Well, at that point, the government certainly can impeach his credibility. Now, that was just an extreme example. But I'll hear you if the defendant takes the stand and if after his testimony you feel that there's strong arguments to be made for the Court to reconsider its ruling.

So the defendant's motion is granted, but without prejudice to the government to -- depending on what the defendant has to say if he takes the stand.

MR. CUTHERBERTSON: Your Honor, I have one further

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point. We did discuss the 1969 conviction yesterday.

THE COURT: Tell me about that.

MR. CUTHBERTSON: The government has been unable to verify whether that is a misdemeanor or a felony, but since we're discussing Rule 609, 609(a) seems to me allows evidence of a conviction of a crime if it involves dishonesty or false statements regardless of the punishment.

THE COURT: Yes.

MR. CUTHBERTSON: And it seems to me that under that portion of the rule, regardless of whether the amount in the 1969 conviction would make that crime a felony or a misdemeanor --

THE COURT: What was the crime?

MR. CUTHBERTSON: The crime was possession of stolen merchandise. It seems to me it's a crime which involves dishonesty, and I think that same logic --

THE COURT: In what way? I mean I could understand perjury, subornation of perjury, false statement on an income tax return, a false statement on some other document --

MR. CUTHBERTSON: When I say that --

THE COURT: -- maybe embezzlement, perhaps. But possession of -- did you say stolen goods?

MR. CUTHBERTSON: Stolen merchandise.

THE COURT: It just escapes me how that is a direct reflection on credibility.

MR. CUTHBERTSON: I would contrast that type of crime

from, say, assault, something of that nature. It seems to me possessing stolen merchandise is inherently dishonest, and I think that same logic applies to the 1975 conviction in New Jersey for possessing untaxed cigarettes.

We have a Second Circuit case, United States versus DeAngelis, which I didn't cite in my memorandum because it wasn't relevant to 10-year old convictions, I believe the conviction there was along the nature of 6 years old.

THE COURT: In DeAngelis?

MR. CUTHBERTSON: Yes. 490 Federal 2nd, 1004. But there the Court got into a discussion of the fact that you can always introduce evidence of crimes involving dishonesty, and the crime there which they were introducing did involve the possession of untaxed cigarettes. I believe, if I'm not mistaken, it involved untaxed cigarettes in New Jersey, as well, it was a 1966 New Jersey conviction for transporting, possessing untaxed cigarettes.

THE COURT: And they allowed it in?

MR. CUTHBERTSON: Yes.

THE COURT: In that case?

MR. CUTHBERTSON: Yes, sir, they did.

THE COURT: And what do we have in our case? Could you be more specific?

MR. CUTHBERTSON: A certified copy of -- conviction, which was unlawfully transporting and possessing untaxed

cigarettes in a vehicle.

THE COURT: And what was the result of that charge?

MR. CUTHBERTSON: There was a \$500 -- 6 month suspended sentence, on apparently the first count, with a \$500 fine, second count was dismissed, the third count there was a 6 months suspended sentence with a \$250 fine, and a 1-year probation term for both.

THE COURT: Would you address yourself to that, Mr. Bowman?

MR. BOWMAN: Well, your Honor, I have read the DeAngelis case -- may I just take the '69 conviction first, I cited in court yesterday the United States versus Toto in the Third Circuit, and that case dealt with a petty larceny conviction, and in oral argument, I believe I cited it to the Court.

There was a Third Circuit case decided the beginning of this year where they said that theft is not what the promulgators of Rule 609 were talking about when they were talking about a crime which talked about dishonesty or false statement. What they are talking about are crimes like obtaining money under false pretenses, possibly embezzlement, perjury, a crime where fraud is a part and an integral part of that crime. Whereas theft is not. And so possession of stolen goods is not.

You don't have to be a liar to possess stolen merchandise. You do have to be a liar to obtain money under false pretenses, perjury. And that's the distinction that the promulgators of the rule were considering when they specifically

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stated that you can bring in prior convictions of crimes which
2 involve dishonesty, false statement.

3 THE COURT: Mr. Bowman, what case did you just refer
4 to in the Third Circuit?

5 MR. BOWMAN: It's United States versus Toto. T-o-t-o.
6 Or I should say Virgin Islands versus Toto.

7 THE COURT: Did you cite that?

8 MR. BOWMAN: In open court yesterday.

9 THE COURT: I guess I didn't pick that up.

10 MR. BOWMAN: I'm looking for my Xerox copy of it right
11 now, your Honor.

12 THE COURT: Just give me the citation, if you have it,
13 and I can call for it.

14 While I'm waiting for that decision to be brought in,
May I take a look at the certified copy of the conviction that
you are referring to?

15 MR. CUTHBERTSON: These are copies of both convictions in question.

THE COURT: It is interesting in Toto, Mr. Bowman, that the Third Circuit first addresses itself to the argument that its Court: that is, the Third Circuit, depart from traditional rule and adopt the rule of those circuits which are more liberal in the reception of impeachment evidence, and if you check the footnote, they cite the Second Circuit, United States versus DiLorenzo, and they cite the Fifth Circuit,

Rodriguez, Fernandez, and they cite the Fourth Circuit, Tenth Circuit and the Sixth Circuit; and, of course, the government quite rightly can argue that the Second Circuit ruling --
recognized by the Third Circuit, incidentally -- should be the one I follow.

MR. BOWMAN: Your Honor, I have not come across in my research any case where the Second Circuit has specifically said that a misdemeanor conviction for possession of stolen goods is admissible for impeachment purposes. And the question here is -- the government hasn't even shown it's a felony conviction.

THE COURT: I'm talking about 1975.

MR. BOWMAN: Oh. Toto I was talking about with respect to '69.

THE COURT: Oh.

MR. BOWMAN: I'm sorry if I misled the Court.

THE COURT: Wait a minute. All right. I've disallowed '61 and '62.

MR. BOWMAN: Yes.

THE COURT: That's all right on the --

MR. BOWMAN: '69 is a conviction the government wants to use for possession of stolen goods, and that's what I believe the Toto case recognizes, and that's what I believe the Toto case stands for, that they can't use a misdemeanor conviction which does not involve a crime of dishonesty.

THE COURT: What do you have to say about the 1975 conviction?

MR. BOWMAN: Well, I have read the case that Mr. Cuthbertson has cited to the Court.

Yesterday in court he did state that he was not going to use the '75 conviction. Apparently today he's changed his mind, and, therefore, I'm not really as prepared as I otherwise would have been today to argue the '75 convictions.

I do recognize the case that he cited. I have read it, and I can only say that my argument is that that does not -- possession of untaxed cigarettes, again, is not a crime like perjury, like obtaining money under false pretenses, like embezzlement.

THE COURT: I must admit, were it not for the DeAngelis case and the references in Toto to the Second Circuit as being more liberal, I wouldn't even allow the 1975 conviction to come in. However, I think on the present state of the record, my ruling is going to be as follows: the 1961, 1962 and 1969 convictions may not be used by the government, with leave to the government to renew their request at the end of the defendant's testimony. The 1975 conviction may be used by the government, and, of course, I rely on the United States versus DeAngelis, which is -- seems to me to be on all fours.

MR. BOWMAN: May I just add one thing, your Honor?

THE COURT: Yes.

MR. BOWMAN: And that is that the DeAngelis case was decided prior to the promulgation of the Federal Rules of Evidence.

THE COURT: Yes. But the -- subsequent to Puco, and they say -- this is Judge Lumbard, I believe -- yes, Judge Lumbard states here: "The appellant's prior conviction was neither remote in time" -- and, of course, that's our situation -- "nor unrelated to veracity," and he found that that crime is not unrelated to veracity. I respect his judgment.

In fact, I am bound by it. So that's the ruling of the Court. 1961, '62 nad '69 may not come in, 1975 may, without prejudice.

MR. BOWMAN: That's the possession of untaxed cigarettes?

THE COURT: That's the New Jersey conviction for transporting-possessing untaxed cigarettes in vehicle.

MR. BOWMAN: May I just look at the certified copy?

THE COURT: Yes.

MR. BOWMAN: It's the first I've seen it.

THE COURT: It is certified at the bottom. That's why I asked to see if --

MR. CUTHBERTSON: Your Honor, I would just like to make sure that you are aware of the language in Puco on page 543.

THE COURT: Yes, what's that?

MR. CUTHBERTSON: With reference to the 1969 conviction

in which the Second Circuit states: "We also have indicated that crimes which involve fraud or stealing reflect on honesty and integrity and therebyon credibility."

THE COURT: Well, actually, you have leave to renew at the end of the defendant's testimony..

MR. CUTHBERTSON: All right.

THE COURT: If you find anything else that's helpful, I'll hear you out at that point.

MR. CUTHBERTSON: The government has information that the special agent of the Alcohol, Tobacco and Firearms Bureau who was with Agent Watterson is out in the hall now.

THE COURT: This is on the motion to suppress?

MR. CUTHBERTSON: That's correct.

THE COURT: All right. Bring him in.

MR. CUTHBERTSON: Neal Olderman.

Bourgeois - direct/cross

don't you?

A Yes and no.

Q Do you know that you aided in putting him in business?

A No.

Q In the business of selling firearms to these agents?

A No, I didn't feel that -- that way, sir.

Q Is it true that you had a part in every sale?

A No.

Q You didn't help arrange the February sale?

A No, I did not.

Q But you kept calling him before February to ask him if he had guns?

A To ask him if he had run into some. Yes.

Q And finally, the lump sum you got was after he was arrested?

A Yes, sir.

MR. BOWMAN: Nothing further.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. CUTHBERTSON:

Q Robin, how long have you known James Apuzzo?

A Over a year.

Q Where do you know him from?

A The New Haven Register.

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Bourgeois - cross

Q. Were you working there?

A. Yes, I was, sir.

Q. Was he working there?

A. Yes, he was.

Q. And did you have occasion to contact law enforcement authorities concerning him?

A. Yes, I did.

Q. Have you ever been in trouble with the police before?

A. Or ever --

A. Never.

Q. -- have any convictions?

A. No.

Q. Any kind of police record?

A. None -- oh. Excuse me. I was picked up hitchhiking 5 years ago in Ohio and I was placed in a detention cell for two days.

Q. Whom specifically did you contact among law enforcement authorities at the very beginning of this case?

A. Detective Donald Olson, North Haven Police Department.

Q. Why did you contact him?

MR. BOWMAN: Objection.

THE COURT: That's very broad.

MR. BOWMAN: It could be anything.

THE COURT: Very broad, yes -- question that could lead

Bourgeois - cross

to almost any kind of an answer. The objection is sustained.

You are on cross-examination, so you can use leading questions.

Q Do you know the detective?

A Yes, I do.

Q How long have you known him?

A Five years.

Q Had you ever worked with him?

A Yes, I have.

Q In what way?

A Working as informant on several cases, one dealing with explosive theft and fugitive, several other things relating to the explosive case.

Q And what did you tell the detective on this occasion?

MR. BOWMAN: Objection.

A I told him --

MR. BOWMAN: I've no idea what the relevance is.

THE COURT: His conversation with the detective wouldn't be relevant. Sustained.

Q When you first contacted law enforcement authorities, did you mention money?

A No.

Q Were you looking for money?

A No.

Q Were you looking for anything?

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Bourgeois - cross

A No.

Q What was your motive for contacting them?

MR. BOWMAN: Objection. Irrelevant.

THE COURT: Overruled.

A Well, I -- in the past two years, I have been looking forward to a career in law enforcement, and any chance that I had to learn, to observe, to participate in law enforcement, I would take. And seeing that a crime was being committed, I --

MR. BOWMAN: Object to that.

THE COURT: Overruled.

A -- I was determined to see that something was done about it.

Q Well, with specific reference to this case, what crime did you think was being committed?

MR. BOWMAN: Objection. That's irrelevant.

THE COURT: Overruled.

A The crime itself, what appeared to me, was stolen articles were being fenced to --

Q Now, with reference to this case.

MR. BOWMAN: I object.

A Reference to this case.

MR. BOWMAN: I have a motion to make with respect to this testimony.

THE COURT: I'll hear you side bar.

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Bourgeois - cross

(At the bench.)

MR. BOWMAN: The witness has volunteered that the crime he thought -- saw or what he thought was being committed was that stolen articles were being fenced. We don't even know if those articles hav' anything in the world to do with this case, so that their relevance isn't even clear whether or not other crimes were being committed.

THE COURT: I will instruct the jury. On the other hand, it is obvious, though, based on your defense, you are claiming that this man entrapped your client into committing the crime, and one of the motives was money, and the government now is saying that was not a motive, there was no entrapment. Now, you know, you can't have it both ways.

MR. BOWMAN: Yes, I know, but there are questions, your Honor, that the prosecutor can ask which do not get responses like that.

THE COURT: Well, of course, I have alerted the prosecutor he can use leading questions, and it is not relevant what the conversations are between this witness and the police officers, but, if anything, it is between the defendant and this witness, if there has been any, I don't know if there has. So you can point out, if you wish, that the motive was not money, but I don't think you ought to let him ramble, because we're never sure what he might come up with, and there could be a.

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Bourgeois - cross

prejudicial --

3 MR. BOWMAN: I'd just like to say, your Honor, on the
4 basis of this testimony, I do move for a mistrial.

5 THE COURT: The motion is denied, but I will give a
6 cautionary instruction to the jury.

7 (In open court.)

8 THE COURT: Ladies and gentlemen, I'm going to give
9 you a cautionary instruction at this time. It probably will be
10 more relevant to your thinking later on after I give the charge,
11 but one of the claims in this case is going to be that the
12 defendant was entrapped. We call it the defense of entrapment,
13 and I will charge you later on as to what principles apply, but
14 among other things, it may be relevant as to who, if anyone,
15 induced the defendant to commit a crime if, indeed, he was
16 induced, or whether he was willing and had the propensity and
17 wanted to commit the crime, anyway.

One of the factors would be the motive of the informant in this case, and that's why I've been allowing some of this evidence to come in. For example, on the one side, they talked about the money being paid to the informant. The government, on the other side, is trying to show that the informant had other motives other than money.

Now, that's why I'm letting it in, so you'll understand, because later on I know you'll have to discuss this in

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Bourgeois - cross

your jury room after I give you the charge, but I do instruct you that this defendant is not on trial for any other crime than the one I mentioned to you at the start of the trial. Any thought processes in this informant's mind -- this witness' mind is not relevant to the guilt or innocence of this defendant, and so I will ask the jury to completely ignore his references to any other crime that he thought might be committed. It has nothing whatever to do with the guilt or innocence of this theft on this charge. But it is relevant to show what the informant was thinking, and what his purpose was in going to the police.

So I think you can see the distinction I'm trying to make. It has nothing whatever to do with this defendant, in truth, and I am only allowing it in because obviously one of the questions that the jury, among many others -- will be who was inducing whom and whether the defense of entrapment is one that's going to be applied by the jury or not, what was the motive of the informant and so forth and so on.

So what his thought processes were are relevant to his thinking: that is, the witness' thinking, but not relevant whatever to the guilt or innocence of this defendant.

Again, I suggest, why don't you use leading questions?

In fact, with that, the jury hasn't been in the courtroom, ladies and gentlemen, but we have, since early morning,

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Bourgeois - cross

and I do have another matter that I have to take care of, and
I have another matter at two o'clock which will take 15 minutes,
so I'm going to excuse the jury now for lunch until 2:15. Please
do not discuss this case with anyone. Just pass the time of day
when you are in the jury room, and don't even discuss it even
among yourselves.

I'll stay on the bench.

The jury is excused.

(Jury left courtroom at 12:30 p.m.)

THE COURT: With respect to this case, the participants
are excused until 2:15, but court is recessed until 2:00, at
which time I'll take up the Meadows matter.

(Recess taken for lunch.)

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in which the Second Circuit states: "We also have indicated that crimes which involve fraud or stealing reflect on honesty and integrity and therebyon credibility."

THE COURT: Well, actually, you have leave to renew at the end of the defendant's testimony.

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